**§201B-2 Hawaii tourism authority; establishment; board; president and chief executive officer.** (a) There is established the Hawaii tourism authority, which shall be a body corporate and a public instrumentality of the State, for the purpose of implementing this chapter. The authority shall be placed within the department of business, economic development, and tourism for administrative purposes only.

(b) The authority shall be headed by a policy-making board of directors that shall consist of twelve members; provided that:

(1) The members shall be appointed by the governor as provided in section 26-34, except as provided by this section;

(2) The members shall include at least one representative each from the city and county of Honolulu and the counties of Hawaii, Kauai, and Maui;

(3) Three members shall be appointed by the governor from a list of three names submitted for each appointment by the president of the senate, and three members shall be appointed by the governor from a list of three names submitted for each appointment by the speaker of the house of representatives; provided that if fewer than three names are submitted for each appointment, the governor may disregard the list;

(4) At least six members shall have knowledge, experience, and expertise in the area of accommodations, transportation, retail, entertainment, or attractions, and at least one member appointed by the governor shall have knowledge, experience, and expertise in the area of Hawaiian cultural practices; provided that no more than three members shall represent, be employed by, or be under contract to any sector of the industry represented on the board;

(5) One member shall be the director of business, economic development, and tourism, or the director's designee, who shall be an ex officio voting member;

(6) The governor shall make appointments to ensure the fulfillment of all requirements of paragraphs (2) and (4); provided that upon the occurrence of a vacancy subject to paragraph (3), the governor shall notify the president of the senate and the speaker of the house of representatives of any unfulfilled requirements pursuant to paragraphs (2) and (4), and the president of the senate or the speaker of the house of

representatives, as appropriate, shall submit nominees who fulfill those requirements; and

(7) No person who has served as a member of the board of directors of the Hawaii Visitors and Convention Bureau shall be eligible to sit as a member of the board of directors of the Hawaii tourism authority until at least two years have expired between the person's termination from service on the Hawaii Visitors and Convention Bureau board and the person's appointment to the authority's board of directors.

(c) Members shall be appointed by the governor for terms of four years; provided that membership on the board shall not exceed eight consecutive years; provided further that each member shall hold office until the member's successor is appointed and qualified.

(d) The board shall elect a chairperson from among the members.

(e) Seven members shall constitute a quorum and a minimum of seven affirmative votes shall be necessary for all actions by the authority. The members shall serve without compensation, but shall be reimbursed for expenses, including traveling expenses, necessary for the performance of their duties.

(f) The board shall appoint one person to serve as president and chief executive officer, exempt from chapters 76 and 88 who shall oversee the authority staff; provided further that the compensation package shall not include private sector moneys or other contributions. The board shall set the president and chief executive officer's duties, responsibilities, holidays, vacations, leaves, hours of work, and working conditions. It may grant other benefits as it deems necessary. [L 1998, c 156, pt of §2; am L 2000, c 253, §150; am L 2002, c 143, §2 and c 148, §19; am L 2003, c 3, §3; am L 2004, c 10, §7 and c 58, §§6, 14(2); am L 2005, c 22, §§46, 50 and c 235, §4; am L 2006, c 306, §1; am L 2007, c 187, §2; am L Sp 2009, c 5, §§4, 12; am L 2010, c 102, §5; am L 2015, c 46, §1; am L Sp 2021, c 1, §18l; am L 2022, c 220, §3]

## Note

The 2022 amendment applies to any vacancy of a Hawaii tourism authority board of directors member appointed pursuant to §201B-2(b)(2) or (4) that occurs on or after July 1, 2022. L 2022, c 220, §4.

## Attorney General Opinions

Subsection (c) is constitutional, with regard to the use of the phrase "appointed and qualified" to describe when a successor's appointment terminates a holdover member's position. Att. Gen. Op. 16-3.

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THE SENATE
THIRTY-FIRST LEGISLATURE, 2022
STATE OF HAWAII

S.B. NO. 3334 S.D. 2 H.D. 1 C.D. 1

# A BILL FOR AN ACT

RELATING TO GOVERNMENT OPERATIONS.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

PART I

SECTION 1. The legislature finds that the effective, efficient, and appropriate development and redevelopment of state lands is an important priority, both for the purposes of economic development and for the creation of new facilities that are of benefit to the public. However, at present, expertise with land development is scattered around state government. The office of planning and sustainable development and the Hawaii state energy office are a part of, and the Hawaii green infrastructure authority is administratively attached to, the department of business, economic development, and tourism. The State's two real estate development agencies, the Hawaii housing finance and development corporation and Hawaii community development authority are also administratively attached to this department. The director of the office of planning and sustainable development and executive director of the Hawaii housing finance and development corporation are the co-chairs of the Hawaii interagency council for transit-oriented development.

The Hawaii technology development corporation is administratively attached to the department of business, economic development, and tourism and has recently become responsible for the development of the first responders campus on Oahu. The Hawaii tourism authority is also administratively attached to the department of business, economic development, and tourism and is considering redeveloping all or a part of the Hawaii convention center.

However, the stadium authority is currently attached to the department of accounting and general services and is responsible for the construction of a new stadium and the development of the area surrounding the stadium, which includes more than seventy acres, is adjacent to the new Honolulu rail line, and is currently used as a parking lot.

Consolidating the State's land development functions within the department of business, economic development, and tourism would centralize the State's land development expertise and thereby more efficiently use the State's limited financial resources and personnel.

Accordingly, the purpose of this Act is to improve the operation of state government by:

(1) Establishing the director of business, economic development, and tourism, or the director's designee, as an ex officio voting member of the Hawaii tourism authority and the stadium authority;

(2) Transferring the stadium authority from the department of accounting and general services to the department of business, economic development, and tourism;

(3) Amending the composition of the stadium authority;

(4) Amending the development guidance policies of the stadium authority; and

(5) Reducing the amount of general obligation bonds that may be issued to the stadium authority for the stadium development district.

PART II

SECTION 2. The purpose of this part is to add the director of business, economic development, and tourism to the board of the Hawaii tourism authority as an ex officio voting member.

SECTION 3. Section 201B-2, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

"(b) The authority shall be headed by a policy-making board of directors that shall consist of twelve members; provided that:

(1) The members shall be appointed by the governor as provided in section 26-34, except as provided by this section;

(2) The members shall include at least one representative each from the city and county of Honolulu and the counties of Hawaii, Kauai, and Maui;

(3) Three members shall be appointed by the governor from a list of three names submitted for each appointment by the president of the senate, and three members shall be appointed by the governor from a list of three names submitted for each appointment by the speaker of the house of representatives; provided that if fewer than three names are submitted for each appointment, the governor may disregard the list;

(4) At least six members shall have knowledge, experience, and expertise in the area of accommodations, transportation, retail, entertainment, or attractions, and at least one member appointed by the governor

shall have knowledge, experience, and expertise in the area of Hawaiian cultural practices; provided that no more than three members shall represent, be employed by, or be under contract to any sector of the industry represented on the board;

(5) One member shall be the director of business, economic development, and tourism, or the director's designee, who shall be an ex officio voting member;

[~~(5)~~] (6) The governor shall make appointments to ensure the fulfillment of all requirements of paragraphs (2) and (4); provided that upon the occurrence of a vacancy subject to paragraph (3), the governor shall notify the president of the senate and the speaker of the house of representatives of any unfulfilled requirements pursuant to paragraphs (2) and (4), and the president of the senate or the speaker of the house of representatives, as appropriate, shall submit nominees who fulfill those requirements; and

[~~(6)~~] (7) No person who has served as a member of the board of directors of the Hawaii Visitors and Convention Bureau shall be eligible to sit as a member of the

board of directors of the Hawaii tourism authority until at least two years have expired between the person's termination from service on the Hawaii Visitors and Convention Bureau board and the person's appointment to the authority's board of directors."

SECTION 4. The amendments made to section 201B-2, Hawaii Revised Statutes, shall apply to any vacancy of a Hawaii tourism authority board of directors member appointed pursuant to section 201B-2(b)(2) or (4), Hawaii Revised Statutes, that occurs on or after the effective date of this Act.

PART III

SECTION 5. The purpose of this part is to:

(1) Transfer the stadium authority from the department of accounting and general services to the department of business, economic development, and tourism; and

(2) Make amendments to chapter 206E, Hawaii Revised Statutes, relating to the membership of the stadium authority, development guidance policies of the stadium authority, and the amount of general obligation bonds that may be issued to the stadium authority.

# EXECUTIVE AND ADMINISTRATIVE OFFICES AND DEPARTMENTS

**Section 6.** All executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same according to common purposes and related functions. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. That person shall hold office for a term to expire at the end of the term for which the governor was elected, unless sooner removed by the governor; except that the removal of the chief legal officer of the State shall be subject to the advice and consent of the senate.

Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and removal of such members shall be as provided by law. Such board, commission or other body may appoint a principal executive officer who, when authorized by law, may be an ex officio, voting member thereof, and who may be removed by a majority vote of the members appointed by the governor.

The governor shall nominate and, by and with the advice and consent of the senate, appoint all officers for whose election or appointment provision is not otherwise provided for by this constitution or by law. If the manner of removal of an officer is not prescribed in this constitution, removal shall be as provided by law.

When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session of the senate. The person so appointed shall not be eligible for another interim appointment to such office if the appointment failed to be confirmed by the senate.

No person who has been nominated for appointment to any office and whose appointment has not received the consent of the senate shall be eligible to an interim appointment thereafter to such office.

Every officer appointed under the provisions of this section shall be a citizen of the United States and shall have been a resident of this State for at least one year immediately preceding that person's appointment, except that this residency requirement shall not apply to the president of the University of Hawaii. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978]

## Cross References

Allocation of departments, see chapter 26.

Temporary agencies, see §26-41.

Term of board members, see §26-34.

## Attorney General Opinions

Residence requirement. Not applicable to president of University of Hawaii. Att. Gen. Op. 61-84. Applicable to superintendent of public instruction. Att. Gen. Op. 62-5. The superintendent of education appointed by the elected board of education need not be a resident of the State. Att. Gen. Op. 66-27.

Appointment of chairpersons of the various boards by the governor and authorizing delegation of powers to them are not contrary to this section. Att. Gen. Op. 64-18.

First paragraph requires that state executive branch agencies be placed within the principal departments of the executive branch of state government, unless they are agencies or commissions that are both temporary and for special purposes. Att. Gen. Op. 96-1.

The interim appointments provision of this section is self-executing. The interim appointments authority granted by this section may be exercised by the governor subject only to the conditions imposed by the constitution itself. The term "vacancy" in the interim appointments provision includes positions made vacant for purposes of appointment, that is, the end of the established term for the relevant office. Att. Gen. Op. 16-3.

The word "appointed" in §26-34(b) does not purport to prevent the governor from exercising the governor's authority to make interim appointments; there is no conflict between §26-34(b) and this section. Therefore, §26-34(b) is constitutional. Att. Gen. Op. 16-3.

The word "qualified" in §269-2 does not purport to prevent the governor from exercising the interim appointments authority in this section; thus, there is no conflict between §269-2 and this section. Therefore, §269-2 is constitutional. Att. Gen. Op. 16-3.

## Case Notes

No unconstitutional delegation of powers was involved in federal-state arrangement for jurisdiction over air carriers. 44 H. 634, 651-53, 361 P.2d 390.

Not violated by administrative revocation program. 76 H. 380, 878 P.2d 719.

Article VI, §1 and this section, neither separately nor together prohibit the establishment of the administrative driver's license revocation office in the judiciary. 91 H. 212 (App.), 982 P.2d 346.

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**§26-34 Selection and terms of members of boards and commissions.** (a) The members of each board and commission established by law shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. Unless otherwise provided by this chapter or by law hereafter enacted, the terms of the members shall be for four years; provided that the governor may reduce the terms of those initially appointed so as to provide, as nearly as can be, for the expiration of an equal number of terms at intervals of one year for each board and commission. Unless otherwise provided by law, each term shall commence on July 1 and expire on June 30, except that the terms of the chairpersons of the board of agriculture, the board of land and natural resources, and the Hawaiian homes commission shall commence on January 1 and expire on December 31. No person shall be appointed consecutively to more than two terms as a member of the same board or commission; provided that membership on any board or commission shall not exceed eight consecutive years.

(b) Any member of a board or commission whose term has expired and who is not disqualified for membership under subsection (a) may continue in office as a holdover member until a successor is nominated and appointed; provided that a holdover member shall not hold office beyond the end of the second regular legislative session following the expiration of the member's term of office.

(c) A vacancy occurring in the membership of any board or commission during a term shall be filled for the unexpired term thereof, subject to Article V, section 6 of the Constitution of the State.

(d) The governor may remove or suspend for cause any member of any board or commission after due notice and public hearing.

(e) Except as otherwise provided by this chapter, this section shall apply to every board and commission established by part I, or existing or established after November 25, 1959. All new appointments to any board or commission shall thereafter be made in accordance with this section.

(f) This section shall not apply to ex officio members of boards and commissions or to the board of trustees of the employees retirement system. [L Sp 1959 2d, c 1, §5; Supp, §14A-3; HRS §26-34; am L 1971, c 143, §3; am L 1984, c 54, §1 and c 72, §1; am L 1985, c 153, §1]

## Attorney General Opinions

The board of election inspectors are within the purview of this section and any vacancy occurring must be filled as prescribed by the state constitution. Att. Gen. Op. 67-16.

Members whose terms are subject to this section hold over upon expiration of their terms of office as de facto officers; but members authorized to hold over until successors are appointed and qualified, as in §304-3, hold over as de jure officers. Att. Gen. Op. 73-7.

While the title or status of de facto officers may not be collaterally attacked, the de facto status is no defense in a quo warranto proceeding. Att. Gen. Op. 73-7.

A board member who has served a partial term followed by a complete term may continue to serve until he has served eight consecutive years. Att. Gen. Op. 74-4.

There is no statutory provision which sets forth the length of time the governor has to make a nomination. Att. Gen. Op. 80-4.

In the absence of other statutory wording to the contrary, the holdover provision from subsection (b) would apply to board and commission statutes that refer to this section; the provision is constitutional. Att. Gen. Op. 16-3.

The word "appointed" in subsection (b) does not purport to prevent the governor from exercising the governor's authority to make interim appointments; there is no conflict between subsection (b) and article V, §6 of the state constitution. Therefore, subsection (b) is constitutional. Att. Gen. Op. 16-3.

## Case Notes

Issue of legality of board members holding office after expiration of eight years held moot and was not decided. 59 H. 244, 580 P.2d 405.

A member of the land use commission did not qualify as a de facto officer, where, among other things, the senate rejected the member's nomination for a second term, which effectively served as public notice that the member was ineligible to serve as a holdover member. 132 H. 184, 320 P.3d 849 (2013).

The intermediate court of appeals erred in determining that a member of the land use commission continued to serve as a valid holdover after the senate's rejection of the member's nomination for a second term; the member's actions with respect to a petition to reclassify land were invalid. 132 H. 184, 320 P.3d 849 (2013).

Cited: 125 F. Supp. 3d 1051 (2015).

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July 15, 2016

The Honorable Ronald D. Kouchi
Senate President
The Twenty-Eighth Legislature
State of Hawai'i
State Capitol, Room 409
415 South Beretania Street
Honolulu, Hawai'i 96813

Dear Senate President Kouchi:

Re: Governor's Interim Appointment to Public Utilities Commission

This letter responds to your written request, dated July 6, 2016, in which you asked several questions related to Governor David Y. Ige's recent interim appointment of Mr. Thomas Gorak to the Public Utilities Commission (PUC).

For the reasons detailed below, we conclude that the Governor is authorized by article V, section 6 of the Hawai'i Constitution to appoint a successor member to the PUC when the term of the incumbent member expires, and irrespective of whether the incumbent continues to serve as a holdover member under section 269-2, Hawaii Revised Statutes (HRS). The relevant portion of article V, section 6, states: "When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session of the senate." As part of the state constitution, this provision is superior to the statutory law governing holdover members on a state board, including the PUC. We acknowledge that some portions of Attorney General Opinion No. 80-4 included statements that indicated otherwise. As explained below, those issues were not central to the issue resolved in that opinion and are superseded by the analysis offered here.

You refer to earlier correspondence from this office, dated June 27, 2016, in which we advised Governor Ige that he possessed the authority to make an interim appointment to the PUC under article V, section 6 of the Hawai'i Constitution. In that letter we concluded that the interim appointments authority, as conferred by the constitution, was not limited by Hawai'i statutes establishing *de jure* holdover status for PUC commissioners after their terms expire. On June 30, 2016, we provided similar written advice to Senator Rosalyn H. Baker, at her request.

This opinion focuses on the questions you posed. We have also endeavored to explain several related legal issues that underlie the Governor's interim appointments authority under the Hawai'i Constitution. Our goal in doing so is to provide a thorough analysis regarding this complex area of law. We note that several of the issues discussed below are open questions under Hawai'i law.

QUESTIONS PRESENTED AND SHORT ANSWERS.

In your letter, you asked six questions. We have rephrased them to assist with the structure of our analysis. The questions are listed below with our short answers. Because questions 1 and 2 overlap significantly, they share one short answer.

1. Our June 27, 2016, letter concluded that the interim appointments provision of article V, section 6 is self-executing because it does not contain the phrase "as provided by law." Therefore, we concluded that the holdover provision in section 269-2, HRS, cannot be read to qualify the self-executing powers conferred upon Governor Ige to make an interim appointment. If article V, section 6 contains the phrase "as provided by law" in relation to the "term of office and removal of such members," can article V, section 6 be limited by sections 26-34 and 269-2, HRS?

2. Assuming that article V, section 6 contains the phrase "as provided by law" in determining the "term of office and removal of such members," does the language contained in section 269-2(a), HRS, stating that PUC members "shall be appointed in the manner prescribed in section 26-34" limit the Governor's interim appointing authority in article V, section 6?

Short Answer. Article V, section 6 of the Hawai'i Constitution contains several distinct provisions regarding the appointment of state officers. The interim appointments provision, which controls here, does not contain the phrase "as

provided by law." In our view, the presence of the phrase "as provided by law" in other portions of article V, section 6, does not limit the power granted by the interim appointments provision. Instead, the phrase "as provided by law," as referenced in your question, permits the Legislature to use statutory law to govern the appointments process as it applies to boards and commissions that serve as the heads of principal departments. If the interim appointments provision itself contained the phrase "as provided by law," then the answer would be yes. Under the current wording of the constitution, however, the answer is no: the interim appointments authority cannot be limited by sections 26-34 and 269-2, HRS.

3. Assuming that article V, section 6 contains the phrase "as provided by law" in determining the "terms of office and removal of such members," does section 26-34, HRS, prohibit replacement of a *de jure* holdover member?

Short Answer. As we read it, section 26-34, HRS, does not prohibit the replacement of a *de jure* holdover member in the context of an interim appointment. We believe this question can be answered as a matter of statutory construction. As explained above, however, the interim appointments provision does not contain the phrase "as provided by law." The phrase "as provided by law," as referenced in your question, permits the Legislature to use statutory law to govern other aspects of the appointments process.

4. Our June 27, 2016, letter concluded that the interim appointments provision of article V, section 6 is self-executing because it does not contain the phrase "as provided by law." If this conclusion is correct, are sections 269-2(a) and 26-34(b), HRS, unconstitutional? (Section 269-2(a), HRS, requires the appointment of members "in the manner prescribed by section 26-34.")

Short Answer. No. As detailed below, sections 269-2(a) and 26-34(b), HRS, are not unconstitutional, because they operate in a manner that is consistent with the interim appointments authority granted by article V, section 6.

5. In light of our earlier letters to Governor Ige and Senator Baker, are Attorney General Opinions Nos. 73-7 and 80-4 void?

Short Answer. No. As detailed below, these two formal opinions addressed different legal questions than those presently

at issue. In addition, the applicable law underlying both opinions has changed since they were issued. Some portions of Opinion No. 80-4 that were not central to the issue resolved in that opinion are superseded by the analysis offered here.

6. Our earlier letter concluded that the interim appointments provision of article V, section 6 is self-executing because it does not contain the phrase "as provided by law." If this conclusion is correct, are other holdover statutes relating to various boards and commissions unconstitutional?

Short Answer. No. We have identified numerous other holdover statutes relevant to your question. Based on our analysis, all of them are constitutional. Of those, at least twelve provisions are substantively identical to the PUC statute at issue here. All of those, as well as section 26-34, HRS, are constitutional, because they operate in a manner that is consistent with the interim appointments authority. The holdover provisions governing the Board of Education and the University of Hawai'i Board of Regents are governed by different provisions of the constitution, but they are also constitutional.

BACKGROUND.

The Hawai'i Constitution has several distinct provisions regarding the appointment of state officers. Most of article V, section 6 is relevant here. We have numbered the paragraphs of section 6 for ease of reference. It reads, in full:

> [1] All executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same according to common purposes and related functions. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.
>
> [2] Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. That person shall hold office for a term to expire at the end of the term for which the governor was elected,

unless sooner removed by the governor; except that the removal of the chief legal officer of the State shall be subject to the advice and consent of the senate.

[3] Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. *The term of office and removal of such members shall be as provided by law.* Such board, commission or other body may appoint a principal executive officer who, when authorized by law, may be an ex officio, voting member thereof, and who may be removed by a majority vote of the members appointed by the governor.

[4] The governor shall nominate and, by and with the advice and consent of the senate, appoint all officers for whose election or appointment provision is not otherwise provided for by this constitution or by law. If the manner of removal of an officer is not prescribed in this constitution, removal shall be as provided by law.

[5] *When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session of the senate.* The person so appointed shall not be eligible for another interim appointment to such office if the appointment failed to be confirmed by the senate.

[6] No person who has been nominated for appointment to any office and whose appointment has not received the consent of the senate shall be eligible to an interim appointment thereafter to such office.

[7] Every officer appointed under the provisions of this section shall be a citizen of the United States and shall have been a resident of this State for at least one year immediately preceding that person's appointment, except that this residency requirement shall not apply to the president of the University of Hawaii.

Haw. Const. art. V, § 6 (emphases added).

There was little discussion on the interim appointments provision in the proceedings of the Constitutional Convention of 1950. There was, however, some discussion indicating that the delegates favored a strong Executive in this context:

> [Delegate] Fong: Now, what protection has the public in a situation like this? Say, we predicate a situation in which the governor appoints a certain individual to be public welfare director and the Senate is in session and the Senate confirms the appointment. One month afterwards he fires him and for the next two years he places another man in there. Now, could he do that under the situation?
>
> [Delegate] Okino: The governor could, under the provisions proposed by this Section 10, but the second appointment is considered as a recess appointment. There must be confirmation before he is considered a permanent appointee for the particular office. The Senate may reject his appointment when the Senate is in session.
>
> [Delegate] Fong: What is the reason for giving the governor such powers?
>
> [Delegate] Okino: The idea is to strengthen the executive department so that he shall be vested with the responsibilities, so that there will be better team work and harmony insofar as the executive department is concerned.

2 *Proceedings of the Constitutional Convention of Hawaii of 1950* at 332 (1961).

ANALYSIS.

A. The Governor's Interim Appointments Authority Is Self-Executing.

The Governor of the State of Hawai'i possesses the authority to fill vacancies in certain public offices by virtue of the interim appointments provision in article V, section 6. It reads, in relevant part:

> When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, unless such appointment is confirmed, at the end of the next session of the senate.

This is part of paragraph [5] above. The interim appointments provision does not contain the phrase "as provided by law." See, e.g., Bd. of Educ. v. Waihee, 70 Haw. 253, 264 n.4, 768 P.2d 1279, 1286 n.4 (1989) ("The phrase 'as provided by law' in the context of state constitutional provisions is a directive to the [L]egislature to enact implementing legislation. And the subject matter modified by the phrase may be dealt with by the Legislature as it deems appropriate.") (citations, brackets, ellipses, and internal quotation marks omitted). The absence of this phrase in this provision is significant under Hawai'i precedent. Its absence reinforces the conclusion that the provision is self-executing.

A constitutional provision is self-executing when it is capable of being enforced on its own:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

State v. Rodrigues, 63 Haw. 412, 414, 629 P.2d 1111, 1113 (1981) (citation omitted). There is no Hawai'i case on the exact issue of whether the interim appointments provision is self-executing. Nevertheless, the provision does not appear to require any further enactments to be effective. The sentence quoted above outlines who may exercise the authority, and when, and the time limitation applied to interim appointments. Haw. Const. art. V, § 6. This provision is fully functional on its own. Finally, the constitution itself states that its provisions are to be self-executing: "The provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit." Haw. Const. art. XVI, § 16.

We also note that other constitutional provisions regarding boards *do* include the phrase "as provided by law." Haw. Const. art. X, §§ 2, 6 (Board of Education and University of Hawaii

Board of Regents, discussed below). The absence of such wording in the interim appointments provision is made more significant by this comparison. These provisions envision implementing legislation; the interim appointments provision does not.

We therefore conclude that the interim appointments provision is self-executing. This provision grants authority to the Governor subject only to the limitations stated in the provision itself. Because the Hawai'i Constitution supersedes inconsistent statutory law, statutes touching upon interim appointments are effective only if consistent with this provision.

In reaching this result, we stress that the interim appointments provision is distinct from the general appointments provision. This is evident from the text of article V, section 6. As numbered above, paragraphs [4] and [5] of section 6 create two distinct processes by which state officers may be appointed. The method of appointment is different depending on whether the Senate is in session. The length of the appointment also differs. And, perhaps most importantly, the two different types of appointments serve different purposes. The general appointments provision governs full-term appointments and requires the "advice and consent" of the Senate when it is in session. Appointees who take office in this manner will serve for full terms, usually four years or longer, or the remaining balance of those set terms. Interim appointments, in contrast, are by nature a temporary measure. An interim appointment lasts only until the conclusion of the next legislative session, unless the Senate confirms the appointee. Haw. Const. art. V, § 6. These appointments are meant to allow government agencies to continue to function even when the legislature is not in session. See, e.g., The Federalist No. 67 (Alexander Hamilton) ("The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments 'during the recess of the Senate, by granting commissions which shall expire at the end of their next session.'") (emphasis in original but formatting altered).[1] This opinion is about the interim

[1] *Available at* https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-67 (last

appointments provision only and does not address the Senate's "advice and consent" role when it is in session.

B. The Paragraph in Article V, Section 6 Regarding Boards and Commissions That Serve as the Head of a Principal Department Does Not Alter the Interim Appointments Authority.

Three questions in your letter refer to another portion of article V, section 6, regarding the "term of office of and removal of such members," which shall be "as provided by law." This text is not found in the interim appointments provision. It comes from a distinct part of article V, section 6:

> Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. *The term of office and removal of such members shall be as provided by law.* Such board, commission or other body may appoint a principal executive officer who, when authorized by law, may be an ex officio, voting member thereof, and who may be removed by a majority vote of the members appointed by the governor.

Haw. Const. art. V, § 6 (emphasis added) (paragraph [3] above). There is no Hawai'i case turning on the interaction between these two paragraphs of section 6. However, relying on the provision's plain language, we conclude that the reference to "such members" refers only to those members of boards or commissions that are serving as "the head[s] of a principal department[.]" Id. As the Hawai'i Supreme Court has described it, the phrase "as provided by law" allows the Legislature to address the "*the subject matter modified by the phrase*" as it "deems appropriate." Bd. of Educ., 70 Haw. at 264 n.4, 768 P.2d at 1286 n.4 (emphasis added). Here, the "subject matter modified" is the terms of office and removal of the members of boards and commissions that serve as the head of a principal department. See also Cty. of Hawaii v. Ala Loop Homeowners, 123 Haw. 391, 404, 235 P.3d 1103, 1116 (2010) ("if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written.") (ellipses and citation omitted).

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visited July 15, 2016).

This provision has no application here, because the PUC is not the head of a principal department. See HRS § 26-4 (listing the principal departments); HRS § 269-2(c) (PUC placed in Department of Commerce and Consumer Affairs for administrative purposes). Even for boards and commissions that are the heads of principal departments, the phrase "term of office and removal of such members" concerns the length of their terms and how they are removed from office. For example, in the absence of other law to the contrary, the default term is four years and removal is "for cause . . . after due notice and public hearing." HRS § 26-34(a), (d). Neither of these subjects concerns *appointment*, which is distinct both as a matter of logic and as a matter of law. Haw. Const. art. V, § 6.

Finally, read in context, we believe this wording does not apply to interim appointments. The interim appointments authority is spelled out in a separate and distinct paragraph, and is separated from this wording by the general appointments provision. (Paragraphs [3], [4], and [5] above.) Instead of governing the interim appointments authority, this provision allows the Legislature, via statutory law, to provide for the terms of office and removal of board and commission members when those boards and commissions serve as the head of a principal department. It does not grant the Legislature the authority to condition the exercise of authority granted by another provision of the constitution.

For these reasons, we concluded that the interim appointments authority, as granted by article V, section 6, may be exercised by the Governor subject only to the conditions imposed by the constitution itself.

C. A "Vacancy" Exists for Purposes of the Interim Appointments Provision When the Term Expires.

Section 269-2, HRS, provides that "[e]ach member shall hold office until the member's successor is appointed and qualified." Because this section allows an incumbent to hold over until the successor is appointed and qualified, an argument can be made that there is no vacancy in the office at the end of a term. As a result, the interim appointments authority granted by article V, section 6, would not be available. This is an open question in Hawai'i. There is no controlling Hawai'i case deciding whether a *de jure* holdover statute prevents a vacancy from occurring for purposes of article V, section 6.[2] But in order to

[2] "Holdover" describes a member of a board or commission who

answer your question regarding the constitutionality of sections 269-2 and 26-34, HRS, we must first offer our opinion on what this portion of article V, section 6 means.

Because there is no Hawai'i case law, we are left with only the text of our constitution and the law from other states to determine our conclusion. In our view, this question turns on interpreting the word "vacancy" in article V, section 6. This is therefore a question of Hawai'i constitutional law that could be definitively answered only by our appellate courts. In the absence of this authority, we offer our opinion on how this provision should be interpreted.

Some out-of-state courts have concluded that the presence of a *de jure* holdover member prevents a vacancy from occurring. See, e.g., Denish v. Johnson, 910 P.2d 914, 920 (N.M. 1996); State ex rel. Thompson v. Gibson, 125 N.W.2d 636, 643 (Wisc. 1964). This would prevent the exercise of an interim appointments authority, because it is triggered only by the existence of a vacancy. Other out-of-state courts, however, have concluded the opposite: that the vacancy is caused by the expiration of the term. See, e.g., State v. Amos, 133 So. 623, 625 (Fla. 1931); State v. Young, 68 So. 241, 247 (La. 1915). While many state courts have concluded that there is no "vacancy" when there is a *de jure* holdover member, we are unable to simply rely on this out-of-state authority because Hawai'i law is different than the provisions interpreted in many of these cases.

For example, in Sweeney v. State, 204 P. 1025, 1026 (Ariz. 1922), and People ex rel. Lamm v. Banta, 542 P.2d 377, 380 (Colo. 1975), each state's constitution contained both an interim appointments provision *and* a holdover provision, giving them equal stature. This is not the case here: the interim appointments authority is constitutional in scope, while the holdover rules are statutory. In Thompson, the Wisconsin legislature had the express power, granted in the Wisconsin constitution, to determine when vacancies in office occurred. This authority does not appear in the Hawai'i constitution. And

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serves after his or her regular term has expired. There are two kinds: (1) *de jure*, which describes a holdover that is explicitly authorized by law, and (2) *de facto*, which describes a holdover that occurs without express authorization. The concept of a holdover follows the common law principle that the law abhors a vacancy. Territory of Hawaii v. Morita, 41 Haw. 1 (Haw. Terr. 1955). This is based on public policy considerations, because the government must operate continuously.

in Opinion of the Justices, 189 A.2d 777, 779 (Del. 1963), the Delaware Supreme Court concluded, based on language unique to the Delaware constitution, that some vacancies were established by the end of the term but others were not. Similar distinctions exist for other cases from other jurisdictions.

Because the out-of-state authority is mixed, we must focus on the Hawai'i Constitution itself. See Denish, 910 P.2d at 920 (other cases in this area "shed little light on the matter before us because the ultimate decision usually is founded upon laws that are peculiar in their wording and of little application in other jurisdictions[.]"). It is axiomatic that legislation cannot be inconsistent with the state constitution. Haw. Const. art. III, § 1. If a state statute purported to bar the Governor from exercising the interim appointments authority, it would be unconstitutional. Likewise, if a state statute purported to prevent the Governor from exercising the general appointments authority, it would be unconstitutional. These realities inform our analysis of the word "vacancy" for purposes of the interim appointments provision.

There are two options: (1) a vacancy exists only if there is no *de jure* holdover member, or (2) a vacancy exists when the term expires. In our opinion, only the second option is consistent with article V, section 6. If a "vacancy" can be avoided by functionally extending the terms of members whose appointments have expired, then the authority granted by article V, section 6 will be substantially — and in individual cases, completely — undercut. This is so for two reasons. First, interpreting "vacancy" in this manner would allow a lengthy *de jure* holdover provision to circumvent the interim appointments authority. That is, it will allow the Legislature, by statute, to effectively excise this power from article V, section 6, even though by its plain terms it is self-executing and vested in the Governor. In other words, defining "vacancy" in this manner would substantially constrict the power granted by the constitution, allowing the Legislature to do indirectly what it cannot do directly. We believe this would be contrary to the intent of article V, section 6. See Young, 68 So. at 247 ("Those who have held that the expiration of a term of office does create a 'vacancy' have given the word a more liberal, figurative meaning, with reference to the intention with which it is used in the Constitution.").

Second, defining "vacancy" by reference to *de jure* holdovers will undercut the Governor's *general* appointments authority. With the expiration of a term, a new Governor should be able to

make appointments to these positions, as part of the authority that comes with the office. If a "vacancy" exists only if there is no *de jure* holdover member, then the statutes can be used to circumvent the Governor's authority by simply allowing holdovers members to continue in office. This is particularly true here, where the PUC's holdover provision has no expiration date. HRS § 269-2. A member could have been appointed for one term with the Senate's consent. It would require the *Governor's* consent to nominate this person for a second term. Yet the holdover statutes can accomplish this without the Governor's consent, because the person can continue in office, for perhaps as long as the total number of years of service permitted by the statute. Id.

In contrast, defining "vacancy" as the end of the established term avoids these problems. The terms for the PUC are set by statute. Id. Both the Governor and the Senate know how long a person will serve when nominated and confirmed, in the absence of death, resignation, or removal for malfeasance. If a term is due to expire in the near future, the Governor can act to fill the position while the Senate is in session *before* the term expires. This would fill the position in anticipation of the vacancy that will occur after the Senate adjourns. If the Governor and the Senate cannot agree on such a course, then the subsequent expiration of the term creates a vacancy, allowing the Governor to make an interim appointment. In contrast to the PUC's holdover statute, this interim appointment expires on its own terms if not confirmed by the Senate. Haw. Const. art. V, § 6. As explained above, defining "vacancy" by reference to the holdover statutes could potentially undercut the Governor's authority. An interim appointment, on the other hand, does not circumvent the Senate's review.

For these reasons, we see the interim appointments authority as part of the checks and balances between the legislative and executive branches of government under the Hawai'i Constitution. See AlohaCare v. Dep't of Human Servs., 127 Haw. 76, 86, 276 P.3d 645, 655 (2012) ("the separation of powers doctrine preserves the checks and balances of our system of government where sovereign power is divided and allocated among three co-equal branches."); Biscoe v. Tanaka, 76 Haw. 380, 383, 878 P.2d 719, 722 (1994) (a branch of government "may not exercise powers not so constitutionally granted, which from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions."); Trustees of Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 170-71, 737 P.2d 446, 456

(1987) ("[L]ike the federal government, ours is one in which the sovereign power is divided and allocated among three co-equal branches.").

If "vacancy" means the end of the term, neither branch is deprived of the authority granted to it by the constitution, consistent with the principles articulated in Hawai'i case law. If, on the other hand, "vacancy" is defined by reference to the *de jure* holdover rules, the Governor's constitutional interim appointments authority will be substantially undercut by these statutes. We note that the common law principle that the law abhors a vacancy does not undermine this conclusion. A rigorous interpretation of the interim appointments provision allows the Governor to *fill* positions where the applicable terms have expired and a new appointment process is naturally anticipated.

We therefore conclude, in order to preserve the balance struck by article V, section 6, that the term "vacancy" in the interim appointments provision includes positions made vacant for purposes of appointment, that is, the end of the established term for the relevant office.

D. Sections 269-2 and 26-34, HRS, Do Not Conflict With the Interim Appointments Provision.

Section 269-2, HRS, governs the appointment of members of the PUC. It reads, in relevant part:

> There shall be a public utilities commission of three members, to be called commissioners, and who shall be appointed in the manner prescribed in section 26-34, except as otherwise provided in this section. . . . *Each member shall hold office until the member's successor is appointed and qualified.* Section 26-34 shall not apply insofar as it relates to the number of terms and consecutive number of years a member can serve on the commission; provided that no member shall serve more than twelve consecutive years.

HRS § 269-2(a) (emphasis added).[3]

[3] In our view, the *appointment* provision of section 269-2, HRS, referenced in your questions two and four, is not at issue here. Section 269-2, HRS, states that the commissioners "shall be appointed in the manner prescribed in section 26-34, except as otherwise provided in this section." Together these two provisions establish that the PUC commissioners are subject to

On an initial review, it may appear that "qualified" is synonymous with "confirmed" by the Senate. Some courts have come to that conclusion. See, e.g., Mackie v. Clinton, 827 F. Supp. 56 (D. D.C. 1993) (there is no present vacancy but only a prospective vacancy until successor confirmed by the senate). Hawai'i courts, however, are silent on whether "qualified" and "confirmed" are synonyms. As outlined above, we conclude that (1) the interim appointments provision is self-executing and fully effective on its own and (2) a position becomes vacant for purposes of this provision when the established term ends. Therefore, we believe that equating "qualified" with Senate confirmation would have the effect of prohibiting the Governor from exercising the interim appointments authority to a substantial degree. This reading of "qualified" in section 269-2, HRS, would effectively create an unconstitutional limitation on the interim appointments authority conferred on the Governor by article V, section 6.

Statutes must be interpreted in a manner that will avoid questions regarding their constitutionality. See In re Doe, 96 Haw. 73, 81, 26 P.3d 562, 570 (2001) ("The doctrine of constitutional doubt . . . counsels that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is adopt the latter.") (citations and internal quotation marks omitted). In this situation, the potential constitutional issue can be avoided by construing the word "qualified" to refer to the Governor's review of the qualifications of the individual as well as the taking of the oath of office by the appointee. This is further supported by the canons of statutory construction. These canons hold that where different words are used, courts presume that the

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Senate confirmation. This is not in dispute; the interim appointments authority applies only to offices that otherwise require Senate confirmation. Haw. Const. art. V, § 6. In our view, the potential conflict between these statutes and the constitution is based on the holdover provisions, which could be interpreted to qualify the authority granted by article V, section 6. The wording governing appointments in section 26-34, HRS, does not raise this concern, because it specifies which offices are subject to Senate confirmation but does not otherwise limit the authority granted by the constitution. See Haw. Const. art. V, § 6 ("The governor shall nominate and, by and with the advice and consent of the senate, appoint all officers for whose election or appointment provision is *not otherwise provided for by this constitution or by law.*") (emphasis added).

difference is intentional and give the difference effect when construing the statute. Compare HRS § 269-2(a) (PUC provision, using "qualified") with HRS § 304A-104(a) (University of Hawaii board of regents provision, using "confirmed" (discussed below)). See also Agustin v. Dan Ostrow Const. Co., Inc., 64 Haw. 80, 83, 636 P.2d 1348, 1351 (1981) ("different words in a statute are presumed to have different meanings"). In this context, then, "qualified," has a different meaning than "confirmed."

In appointing a PUC commissioner, section 269-2, HRS, provides that the Governor qualifies a person by considering persons who have had experience in "accounting, business, engineering, government, finance, law, or other similar fields." We believe that "qualified" means the Governor's review of the appointee's qualifications as well as the taking of the oath of office. See Haw. Const. art. XVI, § 4 (oath of office). "Confirmation," on the other hand, is a separate and distinct function that makes the appointment of a qualified candidate valid and final, vesting entitlement to the office for the entire statutory term. See Sierra Club v. Castle & Cooke, 132 Haw. 184, 192, 320 P.3d 849, 857 (2013) (describing confirmation process). In Seemann v. Kinch, 606 A.2d 1308 (R.I. 1992), the Rhode Island Supreme Court held that "[t]he advice and consent of the Senate is not part of the qualification process." Id. at 1310. In that case, qualification meant the taking of the oath of office and the posting of a bond. The court made a distinction between the confirmation of an appointment and the appointment itself. The court concluded that confirmation "makes the appointment of a qualified candidate valid and final, vesting entitlement to the office for the entire statutory term in that appointed person." Id. at 1311. The court reasoned that "[t]he Senate loses nothing in this process because it retains its exclusive overview power to confirm or to deny the appointee's final vesting of the position, without regard to the fact that such review occurs later once the Senate has reconvened." Id. at 1312. Our interim appointments provision operates in the same manner. Haw. Const. art. V, § 6.

For these reasons, the word "qualified" in section 269-2, HRS, does not purport to prevent the Governor from exercising the interim appointments authority. Thus there is no conflict between section 269-2, HRS, and article V, section 6. We therefore conclude that section 269-2, HRS, is constitutional.

You have also inquired whether section 26-34, HRS, prohibits the replacement of a *de jure* holdover member. You presented this question as premised on the phrase "as provided by law" in the

portion of article V, section 6 that governs members of boards and commissions that serve as the head of a principal department. As explained above, this portion of article V, section 6 is not relevant here.

Furthermore, as a matter of statutory construction, section 26-34 does not prohibit replacement of a *de jure* holdover member. This statute reads, in relevant part:

> Any member of a board or commission whose term has expired and who is not disqualified for membership under subsection (a) *may continue in office as a holdover member until a successor is nominated and appointed*; provided that a holdover member shall not hold office beyond the end of the second regular legislative session following the expiration of the member's term of office.

HRS § 26-34(b) (emphasis added). Essentially for the same reasons articulated above regarding the word "qualified," we conclude that the word "appointed" in this provision does not prohibit the Governor from exercising the interim appointments authority. "Appointment" is not the same as "confirmation." The use of the word "appointment" in section 6 explains why this so:

> When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall expire, *unless such appointment is confirmed*, at the end of the next session of the senate.

Haw. Const. art. V, § 6 (emphasis added). The plain language shows that the "appointment" is the interim appointment itself. Under this provision, a person selected as an interim board member *is* "appointed." There is no conflict with section 26-34(b), HRS, which states that a successor will be "appointed."

An argument might be made that this interpretation of "appointed" would render the word "nominated" in the same provision superfluous because interim appointments do not generally include nominations as a separate step. See, e.g., Camara v. Agsalud, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984) ("It is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant[.]"). We reject

the conclusion that any text in section 26-34, HRS, would be rendered superfluous by our reading of "appointed." Section 26-34(b) governs holdover members regardless of whether their successors are named to a set term under the general appointments provision or to an interim term under the interim appointments provision. Using the general appointments provision, nomination and appointment are distinct steps in the process. Haw. Const. art. V, § 6 (paragraph [4] above). Under the interim appointments provision, the appointment is a one-step process, executed by the Governor. Id. (paragraph [5] above). Section 26-34(b) must function in both contexts and we read it to accommodate this reality. This conclusion is particularly important here, because section 26-34, HRS, is the default provision governing many state boards and commissions. As a result, there is no superfluous text. Section 26-34(b) properly governs holdover members without purporting to limit the Governor's interim appointments authority.

For these reasons, the word "appointed" in section 26-34(b), HRS, does not purport to prevent the Governor from exercising his authority to make interim appointments. There is no conflict between this statute and article V, section 6. We therefore conclude that section 26-34(b), HRS, is constitutional.

E. Other Holdover Statutes Are Constitutional Under the Same Analysis.

You inquired whether other holdover statutes are unconstitutional. We answer in the negative.[4]

We have identified at least 12 other boards and commissions that raise issues nearly identical to those addressed here. The statutes governing each of these boards and commissions use the phrase "appointed and qualified" to describe when a successor's appointment terminates a holdover member's position. These statutes are constitutional for the same reasons discussed above:

| HRS Section | Board or Commission |
|---|---|
| 26-7 | Commission to Promote Uniform Legislation |
| 89-5(c) | Hawaii Labor Relations Board |
| 138-2(f) | Enhanced 911 Board |

[4] This question is relevant only for boards and commissions where the members are subject to Senate confirmation. This is so because the interim appointments provision applies only to positions that are subject to Senate confirmation when the Senate is in session. Haw. Const. art. V, § 6.

| HRS Section | Board or Commission |
|---|---|
| 163D-3(b) | Agribusiness Development Corporation Board of Directors |
| 201B-2(c) | Hawaii Tourism Authority Board of Directors |
| 206E-3(b) | Hawaii Community Development Authority |
| 261E-4(b) | Air Carrier Commission[5] |
| 304A-3202 | Hawaii Members of Western Interstate Commission for Higher Education |
| 322H-1(d) | Hawaii Health Authority |
| 371-4(a) | Labor and Industrial Relations Appeals Board |
| 453-5(a) | Hawaii Medical Board |
| 455-4 | Board of Naturopathic Medicine |
| 464-6 | Board of Professional Engineers, Architects, Surveyors, and Landscape Architects |

Other board and commission statutes refer to section 26-34. See, e.g., HRS § 173A-2.4 (Legacy Land Conversation Commission); HRS § 304A-3151 (Post-secondary Education Commission); HRS § 328-95 (Drug Product Selection Board); HRS § 346C-3 (Long Term Care Financing Program Board of Trustees).[6] In the absence of other statutory wording to the contrary, the holdover provision from section 26-34(b) would apply to these boards. This provision is constitutional as explained above.

In addition, there are at least four other board and commission statutes where members may serve as holdovers until their successors are "appointed," without any reference to the successors being "qualified." See, e.g., HRS § 202-1 (Workforce Development Council); HRS § 206M-2 (High Technology Development Corporation); HRS § 211F-3(a) (Hawaii Strategic Development Corporation); HRS § 351-12 (Crime Victim Compensation Commission). These statutes are also constitutional for the reasons explained above, because an "appointment" properly occurs under the interim appointments provision.

Finally, two statutes provide that a holdover member shall serve until a successor has been "appointed by the governor and confirmed by the senate[.]" HRS § 302A-123 (Board of Education);

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[5] This statute was enacted conditioned on implementing federal legislation and consistency with other federal law. 2008 Haw. 1st Sp. Sess. L. Act 1, §§ 3, 4.

[6] Given the limited time, we were not able to review the statutes governing each state board and commission. The state has more than 170 boards and commissions. See, e.g., State of Hawai'i, Boards and Commissions, http://boards.hawaii.gov/ (last visited July 15, 2016).

HRS § 304A-104(a) (University of Hawaii Board of Regents). On an initial review, the analysis above might indicate that these statutes present a constitutional problem. Further review reveals, however, that this is not the case. Both of these boards are governed by unique provisions of the Hawai'i Constitution, which permit the Legislature to act in each area, using the phrase "as provided by law." See Haw. Const. art. X, § 2 ("There shall be a board of education. The governor shall nominate and, by and with the advice and consent of the senate, appoint the members of the board of education, as provided by law."); Haw. Const. art. X, § 6 ("There shall be a board of regents of the University of Hawaii, the members of which shall be nominated and, by and with the advice and consent of the senate, appointed by the governor from pools of qualified candidates presented to the governor by the candidate advisory council for the board of regents of the University of Hawaii, as provided by law."). Our research found no other holdover statutes using the same wording regarding confirmation. The distinct terminology used by the Legislature in these two statutes further confirms the analysis above regarding the difference between "confirmed" and "qualified."

The constitution explicitly grants the Legislature the authority to regulate these two boards in this manner. Bd. of Educ., 70 Haw. at 264 n.4, 768 P.2d at 1286 n.4 ("the subject matter modified by the phrase [provided by law] may be dealt with by the Legislature as it deems appropriate.") (citation and internal quotation marks omitted). As a result, these two holdover statutes are also constitutional.

F. Attorney General Opinions Nos. 73-7 and 80-4.

You inquired whether two formal Attorney General opinions, Nos. 73-7 and 80-4, are rendered void by our correspondence last month advising the Governor regarding the interim appointments authority. We answer in the negative. The legal issues raised in these opinions are distinct from those raised here. Just as significantly, both previous opinions have been superseded, at least in part, by intervening changes in the law, which pre-dated the recent issue regarding the interim appointment to the PUC.

Attorney General Opinion No. 73-7 addressed the legality of board and commission members holding over after the expiration of their terms. This opinion articulated the difference between *de facto* and *de jure* holdover status. It concluded that (1) section 26-34, HRS, as it then existed, did not establish *de jure* holdover status, (2) members can serve as *de facto* officers after

the expiration of the term, and (3) that even *de facto* holdover members would be barred from serving after reaching the maximum years of permitted service. The opinion did not address the interim appointments provision. This opinion is instructive on holdover members generally. We believe, however, that it is not pertinent here and consequently is not affected by the conclusions reached in this opinion. There is no question raised here about the legality of a holdover member; the issues concern article V, section 6. Furthermore, section 26-34 was later amended to include a *de jure* holdover provision, discussed above. This did not exist at the time the opinion was issued.

Attorney General Opinion No. 80-4 primarily addressed how long a holdover member may serve on the Board of Regents and what occurs when a holdover member is not confirmed for a second term. This opinion considered section 304-3, HRS, as it then existed, which provided that a regent could serve "beyond the expiration date of his term of appointment until his successor has been appointed and has qualified." This opinion concluded that (1) this statute established *de jure* holdover status for the regents following the expiration of their terms, and (2) that where a regent fails to receive confirmation for a second term, he or she may nevertheless holdover *de jure*.

Much has happened since this opinion was issued. A pertinent portion of the constitutional provision governing the Board of Regents was amended. Haw. Const. art. X, § 6; 2005 Haw. Sess. L. at 785 (S.B. No. 1256). It now contains the phrase "as provided by law," which did not exist in 1980. This change alters the analysis regarding the holdover provision governing this board. The statute analyzed in the opinion was later replaced with section 304A-104, HRS. It is also possible that Op. No. 80-4 may be inconsistent with recent Hawai'i caselaw. The opinion concluded that a holdover member's failure to secure a second Senate confirmation did not preclude his continuing to serve as a holdover. In Sierra Club, however, the Hawai'i Supreme Court concluded that a holdover member was disqualified from further service if the Senate rejected a second confirmation. Sierra Club was based on particular wording in section 26-34, HRS, which does not appear in the regents' holdover statute. For this reason, we are not prepared to extend the Court's reading to other statutes that operate differently.

Formal attorney general opinions are issued under section 28-3, HRS. These opinions may serve as persuasive authority, but are not equivalent to appellate court decisions in this regard. See Kepo'o v. Watson, 87 Haw. 91, 101 n.9, 952 P.2d 379, 389 n.9

(1998) ("Attorney General's opinions are highly instructive but are not binding upon this court."). The result in Sierra Club does give us pause regarding the continued viability of the central conclusion in Op. No. 80-4, though perhaps it is not controlling on the regents' holdover statute, as explained above.

We note that there are portions of Op. No. 80-4 that discuss, in passing, the existence of a vacancy when there is a *de jure* holdover member, the phrase "qualified," and whether a holdover is part of the term itself. None of these points are part of the central analysis at issue in this opinion and are therefore akin to *dicta*. *Dicta* refers to legal principles, stated in a court ruling, which are not necessary to the court's ultimate decision and not considered precedential. More importantly, Op. No. 80-4 did not consider in detail the interaction between the constitutional authority granted by article V, section 6, and statutory *de jure* holdover provisions, as we do here. To the extent these statements in Op. No. 80-4 are inconsistent with this opinion, this opinion controls.

CONCLUSION.

For the reasons detailed above, we conclude that the Governor's interim appointments authority granted by article V, section 6 of the Hawai'i Constitution is self-executing and may not be limited by statutory law. We also conclude that a "vacancy" is established for purposes of the interim appointments provision when a member's term expires. We further conclude that sections 269-2 and 26-34, HRS, are constitutional because they operate in a manner consistent with the interim appointments provision. As explained above, these conclusions are limited to the Governor's interim appointments authority and do not affect the Senate's authority in any other respect. We caution that several significant aspects of these issues present open questions under Hawai'i law.

This is a complex and important area of law and we appreciate that you may have further questions. If we may be of further assistance, please do not hesitate to contact us.

Very truly yours,

Douglas S. Chin
Attorney General

**§26-35 Administrative supervision of boards and commissions.** (a) Whenever any board or commission is established or placed within or transferred to a principal department for administrative purposes or subject to the administrative control or supervision of the head of the department, the following provisions shall apply except as otherwise specifically provided by this chapter:

(1) The head of the department shall represent the board or commission in communications with the governor and with the legislature; unless the legislature or a legislative committee requests to communicate directly with the board or commission;

(2) The financial requirements from state funds of the board or commission shall be submitted through the head of the department and included in the budget for the department;

(3) All rules adopted by the board or commission shall be subject to the approval of the governor;

(4) The employment, appointment, promotion, transfer, demotion, discharge, and job descriptions of all officers and employees of or under the jurisdiction of the board or commission shall be determined by the board or commission subject to the approval of the head of the department and to applicable personnel laws;

(5) All purchases of supplies, equipment, or furniture by the board or commission shall be subject to the approval of the head of the department;

(6) The head of the department shall have the power to allocate the space or spaces available to the department and which are to be occupied by the board or commission;

(7) Any quasi-judicial functions of the board or commission shall not be subject to the approval, review, or control of the head of the department; and

(8) Except as set forth hereinabove, the head of the department shall not have the power to supervise or control the board or commission in the exercise of its functions, duties, and powers.

(b) Every board or commission established or placed within a principal department for administrative purposes or subject to the administrative control or supervision of the head of the department shall be considered an arm of the State and shall enjoy the same sovereign immunity available to the State. [L Sp 1959 2d, c 1, §6; am L 1965, c 96,

§140; Supp, §14A-4; HRS §26-35; am L 2004, c 16, §1; am L 2008, c 60, §2]

**Cross References**

Rulemaking procedure, see chapter 91.

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